Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 88-1504

Michelle M. Etlin, Petitioner,

v.

Vladimir N. Etlin, Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIARY COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

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May 24, 1989

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Cases:

Meade v. Meade, 812 F.2d 1473 (4th Cir. 1987) 4, n.1

Statutes:

28 USC 1738A 1, 2, 3, 9, 10

VA CODE 20-108 4

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Appellee Vladimir Etlin ("Father") presented "questions" in his brief in opposition that in fact illuminate certain points which may serve to make certiorari more attractive. First, Father asks if there was "sufficient evidence" to support the trial court's finding that it had jurisdiction to determine Daniel's custody, where Mother "willfully absconded with the four year old child of the parties in October 1982 and remained secreted until being discovered [in Oregon] in ... 1986." (Appellee's brief, p. (i)) This question reveals that the jurisdictional prerequisites of 28 USC 1738A did not guide the Virginia Court's decision on jurisdiction; it was, rather, the Mother's conduct which influenced the decision of the Court. Appellee goes on to concede that the Federal Act was not accorded its legal preemptive effect, asking, "Is there a federal question as to

the applicability of [28 USC 1738A] where the state laws of Virginia controlled continuing jurisdiction of Virginia's Circuit Court and custody questions and when the evidence was sufficient to support jurisdiction?" [emphasis supplied] Appellee tries to ignore the applicability of the Federal Act which governs the several states' determinations and exercise of jurisdiction in interstate cases. Insisting that there is no federal question, Appellee blindly asserts that state law governs.

As to Appellee's other "question," i.e., that Petitioner failed to perfect her appellate rights, he has likewise not responded to the Petition.

JURISDICTION

The Father's brief set forth an unsupported conclusion that there was evidence sufficient to support the trial court's finding that it had jurisdiction.

He did not however address the significant connections issue, or the fact that the several states have no uniform understanding of its parameters. He tried instead to argue the merits, saying that Daniel had relatives in Virginia, etc. In fact, the question:

"Do the presence of relatives in a state and the fact that a child resided there 6 years ago constitute significant connections for purposes of 28 USC 1738A?"

<u>is</u> a federal question. And Appellee's assertion that Virginia law governs jurisdiction <u>is</u> the point Mother made in her Petition: the states are ignoring the uniformity and order the Federal Act seeks to impose; they are doing now what they did ten years before the Federal Act was passed--deciding each case on individual facts which, in any trial court's opinion, may justify the exercise of jurisdiction (such as the fact that Mother disobeyed the judge who was then desirous of jurisdiction to punish her). In each

case the facts are different, the judge is different, and the decision comes out different. Jurisdiction remains, as Petitioner said, "a roll of the dice."

Appellee has not shown that the exercise of jurisdiction by Virginia was more legally sound than a roll of the dice; he has simply reiterated the trial court's view that the Father rolled better dice--precisely the situation for which Petitioner sought certiorari. The fact that VA Code 20-108 gives Virginia "continuing jurisdiction" does not delegitimize the Federal Act's preemptive powers. It only shows that many states still rule as if there is no Federal Act, no Uniform Code, no Constitution.1/

1/ Appellee in fact cites Meade v.Meade, 812 F.2d 1473 (4th Cir. 1987), a case decided in the Federal Courts before the U.S. Supreme Court made it clear that 18 USC 1738A did not give rise to a private cause of action therein. The points about Appellee thus citing Meade are twofold: (1) Meade was not decided on

(continued...)

CONTEMPT

The trial court herein entered an order on March 25, 1987. On page 6 of that order, it held Mother in contempt and sentenced her. That order was entered in the civil case under Chancery 68775. There was and is no criminal case entitled Commonwealth v. Michelle Etlin. Michelle Etlin was never charged with a crime in Virginia or anywhere else.

Mother took the order up on appeal timely and paid for it--into the Court of Appeals of Virginia, to which certiorari is sought. She perfected her appeal and

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1/(...continued)
the notion that the state law governed, but on the notion that the Federal Act governed, contrary to Appellee's assertion--in fact, it could not have been a Fourth Circuit case if there was no federal question presented; (2) Meade is one of the cases in which the states made widely divergent decisions about what constituted "significant connections," exactly the federal question Petitioner submits, exactly the federal question the several states are having such difficulty interpreting.

briefed it. This was an appeal of right in a relatively new court. (That court had previously heard the appeal of another criminal contempt conviction and had reversed, as Mother showed in her Petition and below.) One trial was held--by Court, not by jury. Contempt was not prosecuted by the Commonwealth Attorney. The result was one order, entered March 25, 1987, and signed once, by Judge F. Bruce Bach. One appeal was taken.

Yet the Court of Appeals, to which certiorari is prayed for, refused to hear it because it insisted, in effect, upon two separate appeals of the one order: a civil appeal of pages 1-5 and a writ of error for page 6. And Appellee asserts that this is "not just procedural."

It is obvious that due process can not require a person to stand trial in a chancery proceeding and then deny her appeal of the resulting order under the

theory that part of it is "criminal" and follows different rules!

Appellee's bald, unsupported, conclusory statement that "Code Sections 19.2-318, 320 and 321 are substantive and not just procedural" [Appellee's brief, page 4] is an unreasonable and meaningless statement. Those statutes are procedural only, and manifestly so. Writ of error requires the same fundamental assignment of error as appeal. Appeal in fact includes writ of error. Perfection of appeal and writ of error are substantively the same. All elements of a writ of error are present on appeal. Most important, Virginia caselaw shows that writ of error is the material equivalent of appeal, so there is no rational explanation for the claim that requirement of writ of error instead of appeal is "substantive." It is, in fact, in Appellee's own words, "<u>just procedural</u>."

Furthermore, it is obvious from Appellee's citation of 19.2-320 that there is no substantive difference between appeal and writ of error in this case:

"Any party for whom a Writ of Error lies may apply therefor by complying with the provisions of the rules of the Supreme Court of Virginia relative to the appeal of criminal cases to the Court of Appeals ..." [Appellee's brief, p. 7] [emphasis supplied]

This was a civil case. The order was entered, and even now resides, in the civil order book. Hearing was set on the civil docket. The rules of the Supreme Court of Virginia relative to the appeal of civil cases to the Court of Appeals were followed by Petitioner. Petitioner did not waive her right to appeal. The Court of Appeals of Virginia should be reviewed for denying substantive due process.

CORRECTIONS

Petitioner wishes to correct several misstatements in Appellee's brief--and at

the same time, to point out that the content of these misstatements, not 28 USC 1738A, guided the Courts below. First, Appellee states on page 6 that there is significant evidence in Virginia concerning Daniel. There was no such evidence when the order was made. Second, Judge Redding did not, as Appellee claims on page 6, send the case back from Oregon. Father kidnapped Daniel contrary to Oregon law. Judge Redding never "agreed" to anything because he was never consulted. The Father seized physical possession of Daniel and Judge Bach chose to hear the case. Neither circumstance was contemplated by or consistent with the provisions of 28 USC 1738A. As to the decision below being "correct," as Appellee asserts on page 7, that would go to the merits, not the questions presented for certiorari.

CONCULSION

Appellee has basically agreed that the case presents the federal question of the states' attempts to ignore 28 USC 1738A when it interferes with their own jurisdictional agendas. He shows moreover that there was no viable reason for the Court of Appeals of Virginia to refuse to hear Petitioner's appeal on the issue of contempt. This Court should grant certiorari to instruct the states in cases like Etlin v. Etlin.

The Appellee, who four times approached this Court in forma pauperis, should not be "awarded his costs and damages."

Respectfully submitted,

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